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IN THE SUPREME COURT OF THE UNITED STATES

No. _____

WILLIAM G. MILLIKEN, et al,

Petitioners,

v

RONALD BRADLEY, et al,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners William G. Milliken, Governor of the State of Michigan; Frank J. Kelley, Attorney General of the State of Michigan; Michigan State Board of Education, a constitutional body corporate; John W. Porter, Superintendent of Public Instruction of the State of Michigan, and Allison Green, Treasurer of the State of Michigan, pray that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on June 12, 1973.

OPINIONS AND ORDERS BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Joint Appendix, pp 110a-240a.[1] Other opinions delivered in the Courts below are:

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[1] Hereafter references to the Joint Appendix filed herewith will be indicated by page numbers enclosed in parentheses.

United States District Court for the Eastern District of Michigan, Southern Division

September 27, 1971, Ruling on Issue of Segregation, 338 F Supp 582. (17a-39a).

November 5, 1971, Order [for submission of Detroit-only and metropolitan desegregation plans], not reported. (46a-47a).

March 24, 1972, Ruling on Propriety of Considering a Metropolitan Remedy to Accomplish Desegregation of the Public Schools of the City of Detroit, not reported. (48a-52a).

March 28, 1972, Findings of Fact and Conclusions of Law on Detroit-Only Plans of Desegregation, not reported. (53a-58a).

June 14, 1972, Ruling on Desegregation Area and Order for Development of Plan, and Findings of Fact and Conclusions of Law in Support of Ruling on Desegregation Area and Development of Plan, 345 F Supp 914. (59a-105a).

July 11, 1972, Order for Acquisition of Transportation, not reported. (106a-107a).

United States Court of Appeals for the Sixth Circuit

July 20, 1972, Order [granting leave to appeal], not reported. (108a-109a).

Other opinions of the Court of Appeals rendered at prior stages of the present proceedings are reported in 433 F2d 897, 438 F2d 945 and 468 F2d 902, *cert den*, 409 US 844 (1972).

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on June 12, 1973. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 USC 1254(1).

QUESTIONS PRESENTED

I.

Whether, based upon the controlling precedents of this Court, the state officer defendants have committed acts of de jure segregation with the purpose and present causal effect of separating school children by race either within the School District of the City of Detroit or between Detroit and other school districts in the 1,952 square mile tri-county area of Wayne, Oakland and Macomb?

II.

Whether the Detroit School District, a 63.8% black school district, could operate a unitary system under a Detroit-only desegregation plan, thus meeting the remedial requirements of the Constitution and the decisions of this Court?

III.

Absent any pleaded allegations, any proofs or any findings either that the boundaries of any of the 86 independent school districts within the 1,952 square mile tri-county area of Wayne, Oakland and Macomb have ever been estab-

lished and maintained with the purpose and present causal effect of separating children by race, or that any such school districts, with the sole exception of Detroit, has ever committed any acts of de jure segregation, does the Constitution or any decision of this Court permit a multi-school district remedy?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution:

Amendments, Article V—"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendments, Article X—"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Amendments, Article XI—"The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

Amendments, Article XIV, Section 1—"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Introduction

According to the 1970 census, the population of Michigan is 8,875,083, almost half of which, 4,199,931, resides in the tri-county area of Wayne, Oakland and Macomb. Oakland and Macomb Counties abut Wayne County to the north and Oakland County abuts Macomb County to the west. These counties cover 1,952 square miles.[2] The population of Wayne, Oakland and Macomb counties is 2,666,751, 907,871 and 625,309, respectively. The State's largest city, Detroit, with a population of 1,513,601 is located in Wayne County.

In the 1970-71 school year, there were 2,157,449 children enrolled in the school districts in Michigan. 13.4% of these children were black and 84.8% were white. There are 86 independent, legally distinct school districts within such tri-county area, having a total enrollment of approxi-

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[2] Michigan Statistical Abstract, 1972 (9th ed.). This area is approximately the size of the state of Delaware (2,057 square miles), more than half again the size of the state of Rhode Island (1,214 square miles) and almost 30 times the size of the District of Columbia (67 square miles). Statistical Abstract of United States, 1972 (93rd ed.).

mately 1,000,000 children, approximately 20% of whom are black. (66a). The largest is the School District of the City of Detroit with an enrollment (1970-71 school year) of 289,743 children (20a). In racial composition, 63.8% of these children were black and 34.8% were white. (21a-22a). The boundaries of the School District of the City of Detroit are coterminous with the boundaries of the City of Detroit and have been coterminous for more than 100 years.

The positive law of Michigan has prohibited dual school systems since at least 1869. (157a-158a).

Plaintiffs commenced this class action by filing a complaint on August 18, 1970. (2a-16a). The complaint has not been amended or supplemented in any regard as of the date hereof.

The allegations in plaintiffs' complaint were limited to claims of de jure segregation against the defendants solely within the School District of the City of Detroit. Further, plaintiffs' prayer for relief was limited to the establishment of a unitary system of schools within the School District of the City of Detroit. (13a-15a). In addition, plaintiffs challenged the constitutionality of § 12 of 1970 PA 48 on the grounds that it interfered with the implementation of the Detroit Board of Education's April 7, 1970 plan involving alterations in attendance areas for 12 of the 21 Detroit high schools to increase racial balance in those 12 schools. (13a-15a).

The named defendants were William G. Milliken, Governor of the State of Michigan and ex officio member (without vote) of the Michigan State Board of Education; Frank J. Kelley, Attorney General of the State of Michigan; Michigan State Board of Education, a constitutional body created by Const 1963, art 8, § 3; John W. Porter, Superintendent

of Public Instruction of the State of Michigan, ex officio chairman of the State Board of Education (without vote) and principal executive officer of the Michigan State Department of Education; Board of Education of the School District of the City of Detroit, a body corporate under the laws of the State of Michigan; the individual members of said Board of Education, and the Superintendent of Schools of said Board of Education. No school district other than the School District of the City of Detroit was named as a defendant. On September 3, 1970, Denise Magdowski, et al, were permitted to intervene as defendants, as parents and representatives of parents of children attending the Detroit Public Schools. On November 4, 1970, Detroit Federation of Teachers, Local 231, the collective bargaining representative of the Detroit teachers, was permitted to intervene as a party defendant.

At the conclusion of a hearing upon plaintiffs' application for preliminary injunctive relief, the District Court denied all relief on the grounds that the existence of racial segregation in the School District of the City of Detroit had not been established, and the Court dismissed the action as to the Governor and the Attorney General. In denying interlocutory relief, the District Court did not rule on the constitutionality of 1970 PA 48. Plaintiffs appealed to the Court of Appeals for the Sixth Circuit. The Court of Appeals declared 1970 PA 48, § 12 to be unconstitutional and ordered reinstatement of the Governor and the Attorney General as parties, "at least at the present stage of the proceedings," but affirmed the denial of interlocutory relief. 433 F2d 897. Defendants did not seek a review of this decision of the Court of Appeals.

Upon remand, plaintiffs moved in the District Court for an order requiring immediate implementation of the April 7, 1970 racial balance plan. After receiving additional plans

from the Board of Education of the City of Detroit and conducting a hearing thereon, the District Court entered an order approving an alternative plan. Plaintiffs, claiming the alternative plan to be constitutionally insufficient, sought emergency relief in the Court of Appeals. The Court of Appeals denied plaintiffs' claim for relief and ordered the District Court to set a hearing on the merits forthwith. 438 F2d 945.

Trial on the merits, limited to the issue of segregation *within* the School District of the City of Detroit, began on April 6, 1971 and concluded on July 22, 1971, consuming 41 trial days. On September 27, 1971, the District Court rendered its ruling on issue of segregation in which it found that "both the *State of Michigan* and the Detroit Board of Education have committed acts which have been causal factors in the segregated condition of the public schools of the City of Detroit." [Emphasis added.] (33a). The acts, which the District Court found to result in de jure segregation, related to pupil assignment solely within the School District of the City of Detroit.

At a hearing held on October 4, 1971, the Court orally ordered the Detroit Board of Education to submit its plan for desegregation of its schools within 60 days and ordered the "State defendants" to submit "a metropolitan plan of desegregation" within 120 days. (43a). A written order to the same effect was entered on November 5, 1971. (46a-47a).

The state officer defendants sought to appeal the Ruling on Issue of Segregation and the Order of November 5, 1971, requiring them to submit a metropolitan plan of desegregation. The appeal was dismissed for the stated reason that the decision and order sought to be appealed were not final. 468 F2d 902. The state officer defendants sought to review the dismissal of the appeal by petitioning for certiorari in this Court. The petition was denied. 409 US 844.

The plans for desegregation were filed within the time limits imposed by the Court, that is, not later than February 4, 1972. Between February 9 and 17, 1972, 43 school districts within the counties of Wayne, Oakland and Macomb filed motions to intervene for the purpose of representing their interests and those of the parents and children residing in the respective school districts. On March 15, 1972, the District Court issued its order granting the school districts' motions to intervene as a matter of right, but imposing conditions designed to limit their participation in the proceedings. (208a-209a). The intervenor school districts were afforded one week, to March 22, 1972, to file their briefs on the legal propriety of a metropolitan plan of desegregation. (209a-210a). The District Court filed its ruling that such a plan was appropriate on March 24, 1972. (48a).

Having concluded that consideration of a metropolitan remedy was appropriate, the District Court commenced taking testimony on such a plan on March 28, 1972. Later that day, the District Court filed its Findings of Fact and Conclusions of Law on Detroit-Only Plans of Desegregation. (53a). The essence of the Court's ruling was that no Detroit-only plan could result in the desegregation of the School District of the City of Detroit because it has a majority black student body.

On June 14, 1972, the District Court filed its Ruling on Desegregation Area and Order for Development of Plan of Desegregation (97a) and its Findings of Fact and Conclusions of Law in Support of Ruling on Desegregation Area and Development of Plan. (59a). The judicially decreed "desegregation area" included 53 school districts covering approximately 700 square miles within a three county area. The District Court's remedial decree involved 780,000 school children of which at least 310,000 were required to be transported. (72a). The June 14, 1972 order of the District

Court requiring pupil reassignment and cross-district transportation of pupils for racial balance purposes constitutes the most massive remedial decree entered heretofore in a school desegregation case. Further, although the District Court had expressly found no de jure segregation as to faculty within Detroit, this order required faculty and staff reassignment among school districts. (Compare 28a-33a with 102a-103a.)

In entering this order, the District Court expressly noted that it had taken no proof with respect to the establishment of the boundaries of the 86 public school districts in the counties of Wayne, Oakland and Macomb, nor on the issue of whether, with the exclusion of the Detroit School District, such school districts have committed any acts of de jure segregation. (59a-60a). Further, 18 of the school districts included in the "desegregation area" had never been made parties to this litigation.

The Ruling on Desegregation Area also appointed a panel of nine persons, later increased to eleven, and charged it with the responsibility of preparing and submitting a desegregation plan in accordance with the provisions of the ruling. (99a).

On July 5, 1972, the panel recommended to the Court "the use of state funds for the immediate purchase of at least 295 additional vehicles to be used in the implementation of the interim plan." On July 11, 1972, the District Court entered an order directing the Board of Education of the City of Detroit to acquire 295 buses, the contracts for such acquisition to be entered into not later than July 13, 1972. (106a-107a). The "state defendants" including added "state defendant state treasurer Allison Green" were ordered to bear the cost thereof. By a contemporaneous order, the

Court on its own motion ordered Allison Green, Treasurer of the State of Michigan, to be made a party defendant in the action.

On July 20, 1972, the District Court, pursuant to oral motions made on July 19, 1972, and under the provisions of 28 USC 1292(b) certified the issues presented by the 5 controlling orders or rulings, to-wit, (1) Ruling on Issue of Segregation, September 27, 1971, (2) Ruling on Propriety of Considering Metropolitan Remedy, March 24, 1972, (3) Findings of Fact and Conclusions of Law on Detroit-Only Plans of Desegregation, March 28, 1972, (4) Ruling on Desegregation Area and Order for Development of Plan, and Findings of Fact and Conclusions of Law in Support thereof, July 14, 1972, and (5) Order for Acquisition of Transportation, July 11, 1972. The state officer defendants, and others, petitioned the Court of Appeals for permission to appeal the controlling orders, which permission was granted by the Court of Appeals. (108a). In granting permission, the Court of Appeals said:

> "This court concludes that among the substantial questions presented there is at least one difficult issue of first impression which has never been decided by this court or the Supreme Court." (108a).

In said order, the Court of Appeals stayed the order for acquisition of transportation, July 11, 1972, and all proceedings with regard to the assignment of children and faculty within the desegregation area, except planning. (109a).

On August 21, 1972, the Court of Appeals granted intervention in this cause to the Michigan Education Association, and on July 21, 1973, the Court of Appeals granted intervention herein to the Professional Personnel of Van Dyke.

A panel of the Court of Appeals filed its opinion on December 8, 1972. Thereafter, defendants moved for a rehearing in banc which was granted. Following rehearing, in a 6 to 3 decision the Court of Appeals (in banc) in substance affirmed the District Court's ruling on the issue of segregation and its ruling on Detroit-only plan of desegregation. Although vacating or partially vacating the Ruling on Propriety of Metropolitan Remedy, Ruling on Desegregation Area, and Order for Acquisition of Transportation, the Court of Appeals affirmed the power of the District Court to enter such orders herein. The sole infirmity found on appeal was the failure to add as parties the 18 school districts within the "desegregation area" that had never been joined as parties in this cause. In substance, the Court of Appeals held that a multi-district remedy was not only constitutionally permitted, but mandated in this cause.

On August 6, 1973 plaintiffs filed a motion in the District Court, seeking to join as parties in this cause all of the school districts in the counties of Wayne, Oakland and Macomb that have not already been made parties herein, with the exception of the Pontiac School District.

REASONS FOR GRANTING THE WRIT

I.

THE RULING OF THE SIXTH CIRCUIT COURT OF APPEALS THAT THE STATE OFFICER DEFENDANTS HAVE COMMITTED ACTS RESULTING IN DE JURE SEGREGATION OF PUPILS, BOTH WITHIN THE SCHOOL DISTRICT OF THE CITY OF DETROIT AND BETWEEN DETROIT AND OTHER SCHOOL DISTRICTS IN THE TRI-COUNTY AREA, IS WITHOUT BASIS IN LAW OR FACT AND IN CONFLICT WITH THE DECISIONS OF BOTH OTHER COURTS OF APPEALS AND THIS COURT.

At the outset it is emphasized that the decisions of the lower courts herein represent, not a faithful adherence to the Constitution and the binding precedents of this Court, but rather an attempt to use the law as a lever in attaining what the lower courts decided is the desirable social goal of multi-school district racial balance throughout a huge three county area. This is vividly demonstrated by the trial court's statement in a subsequent remedy pre-trial conference, "[i]n reality, our courts are called upon, in these school cases, to attain a social goal, through the educational system, by using law as a lever." (41a).

Moving to the appellate level, the sound dissent of the late Circuit Judge Kent sets forth the overriding concern of the Sixth Circuit majority for racial balance among school districts as follows:

> "Through the majority's opinion runs the thread which holds it together. That thread is the unwillingness apparent in the minds of the majority to sanction a black school district within a city which it concludes will be surrounded by white suburbs. While the majority does not now state that such a demographic pattern is inherently unconstitutional, nevertheless, I am persuaded that those who subscribe to the majority opinion are convinced, as stated in the slip opinion of the original panel, 'big city school systems for blacks surrounded by suburban school systems for whites cannot represent equal protection of the law.' While that statement has been removed from the opinion of the majority, yet the premise upon which the statement was obviously based must necessarily form the foundation for the conclusions reached in the majority opinion. It may be that such will become the law, but such a conclusion should not receive our approval on a record such as exists in this case." (224a).

Thus, the underlying premise of both lower courts is the achievement of what they perceived as the desirable social goal of racial balance among school districts, rather than the vindication of constitutional rights to attend a school free from racial discrimination by public school authorities. *Brown* v *Board of Education*, 347 US 483 (1954). Viewed against this background, the state officer defendants submit that the de jure findings against them are mere makeweights designed to provide the legal window dressing for the achievement of multi-school district racial balance.

The constitutional violations found to have been committed by the state officer defendants are set forth under the caption of "State of Michigan". The majority opinion elsewhere declares that the State of Michigan is not a party to this cause and that references thereto are to be read as references to the state and local officials through whom the state allegedly acted, thus compelling the conclusion that the findings are directed against the state officer defendants. (115a, 151a-152a). The following review of these findings, focusing on patent conflicts with decisions of both other circuits and this Court, demonstrates the compelling need for immediate review by this Court.

Finding (1) — Detroit Board of Education an Agency of the State of Michigan

If finding (1) means only that the actions of defendant Detroit Board of Education constitute state action within the scope of the Equal Protection Clause, then it merely confirms the obvious and adds nothing to the opinion. (151a). If, on the other hand, this finding constitutes a determination of vicarious liability against the state officer defendants, based on the conduct of the Detroit Board of Education, then such finding is erroneous.

To the extent finding (1) is based upon an agency theory of vicarious liability, it must be stressed that, under settled Michigan law, school districts are local state agencies of legislative creation exercising plenary discretionary power over student assignment within their respective school districts. *Attorney General, ex rel Kies* v *Lowrey*, 131 Mich 639, 644 (1902), aff'd 199 US 233 (1905). *School District of the City of Lansing* v *State Board of Education*, 367 Mich 591, 595 (1962), *Senghas* v *L'Anse Creuse Public Schools*, 368 Mich 557, 560 (1962), 1955 PA 269, as amended, MCLA 340.1 et seq; MSA 15.3001 et seq, hereinafter referred to as the school code of 1955. Thus, assuming arguendo any vitality to an agency theory of vicarious liability, it is clear that the School District of the City of Detroit is not an agent, under Michigan law, of any of the state officer defendants herein.[3] Indeed, the Court of Appeals'

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[3] The position of the state officer defendants is that the existing racial imbalance in the Detroit public schools is the product of population movement and housing patterns, as emphasized by trial court that "[t]he principal causes undeniably have been population movement and housing patterns. . . ." Further, the district court ruled that there was no de jure faculty segregation in Detroit. In addition, it is significant by way of illustration that, as to the optional attendance zones, all but one had been eliminated prior to trial, and the remaining optional zone was in the process of being eliminated in a manner that increased integration. (33a, 28a, 25a). The Detroit Board of Education has voted not to file a petition for certiorari. The election of the Detroit Board of Education to accept, without challenge, the findings of de jure conduct against it, in its desire to embrace and achieve a multi-school district remedy, is its decision alone to make under Michigan law. This development is proof positive that, under Michigan law, the Detroit Board of Education governs and controls the conduct of the Schoool District of the City of Detroit. The state officer defendants are no more able to represent the interests of the Detroit Board of Education, with its own locally selected legal counsel, than they are the other school districts in Wayne, Oakland and Macomb counties, with their own locally chosen legal counsel. (233a-234a).

majority opinion expressly rejects any agency theory, as between the state officer defendants and local school districts in its holding that any "affected district first must be made a party to this litigation and afforded an opportunity to be heard." (177a).

Neither lower court made any findings against either the Governor or the Attorney General of conduct resulting in de jure segregation. Thus, absent the erroneous notion of vicarious liability, there is simply no basis for either a finding of acts having been committed by these state defendants which resulted in de jure segregation, or the granting of relief as against these two defendants and the case as to them must be dismissed. This is the sound result reached initially by the District Court herein, 433 F2d 897, 905 (CA 6, 1970), and on appeal by Circuit Judge Weick. (216a). The reliance of the lower courts on the "inaction" of the state officer defendants squarely conflicts with this Court's ruling in *Keyes* v. *School District No. 1, Denver, Colorado,* ..... US ....., 93 S Ct 2686, 2696 (1973), that "intentional state action" is an essential element of a finding of de jure segregation. (173a).

The defendant, State Treasurer, was added after the violation hearings so that the District Court could order the State Treasurer to pay funds from the state treasury to purchase 295 buses for the multi-district remedy. As to him also, the case must be dismissed since there is no claim or finding of unconstitutional conduct by him and the settled case law of this Court under the Eleventh Amendment precludes compelling payment of funds out of the State Treasury where, as here, the State of Michigan has never consented to this suit in Federal Court. (See the sound discussion of this point in the dissenting opinion of Circuit Judge Weick.) (213a-215a).

Finding (4) — Allocation of Transportation Funds

The District Court's opinion contained the following language which was quoted on appeal by the majority opinion:

> "'. . . The State refused, until this session of the legislature, to provide authorization or funds for the transportation of pupils within Detroit regardless of their poverty or distance from the school to which they were assigned, while providing in many neighboring, mostly white, suburban districts the full range of state supported transportation. This and other financial limitations, such as those on bonding and the working of the state aid formula whereby suburban districts were able to make far larger per pupil expenditures despite less tax effort, have created and perpetuated *systematic educational inequalities.*'" (Emphasis added.) (152a).

This language, which constitutes a major part of the District Court's holding against the state officer defendants on the initial question of de jure segregation in Detroit goes, not to the question of pupil assignment in Detroit, but to the markedly different question of inter-district disparities in school finance. This question has subsequently been definitively adjudicated by this Court in *San Antonio Independent School District* v. *Rodriguez,* ____ US ____, 93 S Ct 1278 (1973), and the conclusion is compelled that both lower courts erred in relying on alleged inter-district financial disparities. The financial disparities among school districts in Michigan, as in Texas, are the result of local variations in both taxable property per pupil and school tax rates that are not violative of the Equal Protection Clause under the applicable rational basis test. *Rodriguez, supra,* 1302-1304. See, also, Mich Const 1963,

art 9, § 6 and § 11 for the constitutional outline of Michigan's system of school finance.

The majority opinion in the Sixth Circuit, while quoting this language, appears to expressly adopt as its own finding only the language dealing with transportation funds. This reluctance to embrace and approve the general operating and bonding portions of the trial court's finance language is understandable since such findings are contrary to the facts in this cause.

The trial court's ruling as to state aid transportation funding, which was independently adopted and set forth as finding (4) on appeal, warrants scrutiny. (151a). This urban rural statutory distinction was recently found to be both reasonable and non-racial by another Federal District Court in Michigan as follows:

> "There was proof that rural school districts received up to 75% reimbursement for student transportation expense where none was, until recently, received by the Grand Rapids Board or other districts for students residing within the city limits. While plaintiffs do not press any claim that the law is unconstitutional, they urge that the fact of the distinction is discriminatory as part of overall state action claimed violative of plaintiffs' rights. It is an urban-rural classification distinction based upon known differences usually characteristic of urban and rural areas: absence of public transportation, sidewalks, lesser density of student population and genarally longer distances. It is in no part related to racial difference."

Higgins v *Board of Education of the City of Grand Rapids, Michigan,* (WD, Mich, CA 6386), Slip

Opinion of Judge Albert J. Engel, July 18, 1973, p 77.[4]

Further, applying the correct reasonable basis test enunciated in *Rodriguez, supra,* a three judge federal court held this very type of urban-rural classification for purposes of state school aid transportation funding "plainly constitutional." *Sparrow* v *Gill,* 304 F Supp 86, 90-91, (MD NC 1969). As recognized in the opinion of Mr. Justice Powell in *Keyes, supra,* 2714, the need for pupil transportation is obviously greater in rural than in urban areas.

In *Keyes, supra,* 2697, this Court emphasized that the difference between de jure and de facto segregation is a finding of purposeful intent to segregate. In the instant cause, neither lower court made any finding of purposeful segregation in connection with the statutory urban-rural classification employed for allocating categorical state school aid transportation funds to school districts. Clearly, this urban-rural geographical statutory classification is not based on race but on whether children reside within or without incorporated cities, irrespective of race.

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[4] In *Higgins, supra,* plaintiffs sought a multi-district desegregation remedy involving Grand Rapids, which has only a 25% black student body, and 11 other surrounding school districts. In a 105 page opinion, following a 27 day trial in which all 12 school districts and the same state officer defendants involved herein fully participated, the District Court ruled that, with the sole exception of faculty assignment within Grand Rapids, ". . . the proofs have failed to establish the other allegations in plaintiffs' complaint, as amended, as to the Grand Rapids Board of Education or as to any other defendants in the case." Slip opinion, p. 103. Thus, in *Higgins, supra,* plaintiffs' claims of de jure conduct against the state officer defendants, not unlike those made herein, were found wholly lacking in merit.

Moreover, in *Keyes, supra,* 2698, 2699, this Court held that another finding essential in determining de jure segregation is that the acts in question must have a present causal effect of segregation. In this regard, the District Court's finding on transportation reimbursement made no reference to any finding of segregative effect within Detroit. (27a). The Court of Appeals' majority opinion erroneously conveys the impression that the trial court made a finding that the lack of state aid transportation reimbursement "contributed to pupil segregation." (154a).

However, the trial court made no such finding as, indeed, it logically could not in light of its de jure findings concerning the conduct of the Detroit Board of Education in transporting children to relieve overcrowding. (129a-139a). The Court of Appeals' majority opinion is manifestly inconsistent in its dual ruling that, while Detroit transported children in a manner furthering segregation, the lack of state school aid transportation funds in Detroit also contributed to pupil segregation in some inexplicable way.

Finally, as to finding (4), neither lower court made any finding that the urban-rural statutory classification employed for state school aid transportation reimbursement to school districts to transport their own pupils had any effect on the distribution of pupils by race as between Detroit and the other 85 school districts in Wayne, Oakland and Macomb counties.

Finding (5) — Transportation of Carver School District's High School Students

Finding (5) relates to the transportation, by the Detroit Board of Education, of high school students from the

Carver School District, which did not have a high school, to Northern High School within Detroit during the late 1950's. The majority opinion states that such transportation "could not have taken place without the *approval, tacit or express,* of the State Board of Education." (Emphasis added) (137a-139a, 152a).

The trial court's finding on this point contains no reference to the State Board of Education. (96a). The ambiguous phrase "tacit or express" is employed for the reason that the record is barren of any proof that the State Board of Education possessed any actual knowledge of the transportation in question, let alone approving same. The reference to the State Board of Education by the Sixth Circuit majority is simply its own embellishment cut from whole cloth without any evidentiary support. The requirement of a finding of segregative purpose enunciated in *Keyes, supra,* 2697, is totally lacking as to finding (5).

The majority opinion of the Sixth Circuit correctly states that, in 1960, the Carver School District lost its identity and became a part of the Oak Park School District under Michigan law. (169a). This Court has adopted the sound rule that, to establish a constitutional violation, there must be a causal relationship between the act complained of and a present condition of segregation. *Keyes, supra,* 2698, 2699. Obviously, the reliance of the majority herein on the transportation of Carver students in the late 1950's to a Detroit high school fails to meet this controlling test of present causal nexus in light of subsequent developments since 1960 involving the attachment of the Carver School District to Oak Park, a basically all white school district, and the attendance of students now residing in the former Carver area in the Oak Park schools since that time.

Finding (3) — School Construction

Finding (3) relates to the matter of school construction. This finding is premised on the alleged statutory control of defendant State Board of Education over site selection by local school boards for new school construction. (151a, 157a). This finding of de jure segregation must be carefully examined in light of Michigan's statutory provisions relating to site selection and school construction.

Under Michigan law, defendant Detroit Board of Education is empowered with plenary discretionary authority to acquire school sites. See sections 192 and 220a of the School Code of 1955, *supra*. The basic Michigan statute dealing with the construction of school buildings is 1937 PA 306, as amended, MCLA 388.851 *et seq;* MSA 15.1961 *et seq*. In 1949, by 1949 PA 231, the legislature amended section 1 of this act to provide, for the first time, that in the approval of construction plans by the Superintendent of Public Instruction, not the State Board of Education, he was to consider, as one of several factors, "[t]he adequacy and location of the site." In 1962, by virtue of 1962 PA 175, the legislature amended section 1 of this statute again, thereby removing any power on the part of the Superintendent of Public Instruction to consider site location as a factor in approving or disapproving school construction plans. This statute, since 1962 and presently, deals only with approval of school construction plans in terms of fire, health and safety requirements.

Thus, under Michigan law, the legal authority of defendant, Superintendent of Public Instruction in site selection was, prior to 1949 and after 1962, nonexistent. During the intervening period, this limited role related, not to the time at which the site was purchased by the local board of education but, to a subsequent point in time relating to

the submission of construction plans for approval as to health, fire and safety, at which point he could consider, as one of several factors, the adequacy and location of the site. It is the Detroit Board of Education, acting alone, that establishes the attendance areas for each school under its jurisdiction. *Hiers* v *Detroit Superintendent of Schools*, 376 Mich 225, 235 (1965).

Virtually all the construction relied upon by the lower courts in finding de jure segregation occurred after 1962. (144a-151a). Clearly, a failure on the part of the Superintendent of Public Instruction to exercise a nonexistent power under state law cannot constitute purposeful de jure segregation as required by *Keyes, supra*, 2697. This portion of the Court of Appeals' majority opinion is in direct conflict with the en banc opinion of the Fourth Circuit in *Smith* v *North Carolina State Board of Education*, 444 F2d 6 (CA 4, 1971), vacating portions of the District Court's order directed at the state defendants therein for the reason that, under state law, such defendants lacked any lawful authority to prescribe school attendance plans for local school districts. As the North Carolina State Board of Education lacked authority, under state law, to prescribe school attendance plans for local school districts, so here the Superintendent of Public Instruction lacked any authority under Michigan law, to veto the school site selections of defendant Detroit Board of Education.

Although all the construction relied upon relates solely to school construction within Detroit, the Court of Appeals' majority opinion transforms such evidence into a conclusion that such construction "fostered segregation throughout the Detroit metropolitan area." (Compare 144a-151a and 157a). It is impossible to conceive how the location and construction of school buildings in Detroit, by the Detroit Board of Education to serve the children

residing therein, constitutes multi-school district de jure segregation by the Superintendent of Public Instruction in approving construction plans as to health, fire and safety. Further, such conclusion on appeal is impossible to reconcile with the trial court's express statement that no proofs were taken as to whether any school district, other than Detroit, committed any acts of de jure segregation. (59a-60a).

Detroit and the other 85 school districts within the counties of Wayne, Oakland and Macomb each has a locally elected board of education with the duty to educate the resident children therein. To this end, each of these locally elected school boards is empowered to acquire sites and construct school buildings that are financed by the sale of bonds and the imposition of general ad valorem property taxes on property within each district to pay off such bonds. See sections 77a, 115, 158, 220a and 356 of the School Code of 1955, as amended, *supra*. Unless this entire statutory scheme of local governance and finance, involving separate, identifiable and unrelated school districts, *Keyes, supra*, 2695, is unconstitutional for failure to guarantee racial balance within a three county area, the Court of Appeals' majority clearly erred in its purported finding of a multi-school district construction violation. As stated in *Rodriguez, supra*, 1307, footnote 110, "[t]his Court has never doubted the propriety of maintaining political subdivisions within the States and has never found in the Equal Protection Clause any 'per se' rule of 'territorial uniformity.' . . ."

Finding (2) — The Effect of 1970 PA 48

Finding (2) relates to Section 12 of 1969 PA 244, as amended by 1970 PA 48, MCLA 388.182; MSA 15.2298(12), which section delayed implementation of defendant Detroit

Board of Education's April 7, 1970 racial balance plan affecting 12 of its 21 high schools over a three year period. (114a-116a, 151a). Section 12 of 1969 PA 244, as amended by 1970 PA 48, *supra,* was held invalid by the Court of Appeals on October 13, 1970, and the trial court was expressly directed to give no effect to such section at the trial of this cause. However, the Court of Appeals refused to order implementation of the April 7, 1970 plan prior to a trial on the merits. 433 F2d 897, 904-905 (CA 6, 1970).

From and after October 13, 1970, Section 12 has been legally ineffective. 433 F2d 897, *supra.* The lack of implementation of the April 7, 1970 plan, since that date, has been the result of the unwillingness of the Detroit Board of Education to implement such plan and the refusal of the District Court, subsequently affirmed on appeal, to order its implementation. 438 F2d 945 (CA 6, 1971) Thus, Section 12 has long since ceased to have any causal nexus to the racial composition of the 12 Detroit high schools included in the April 7, 1970 plan. *Keyes, supra,* 2698, 2699. Moreover the April 7, 1970 plan, affecting only 12 of 21 Detroit high schools, had no causal connection with the distribution of pupils by race between Detroit and any other Michigan school districts.[5]

This review of the purported findings below against the state defendants conclusively demonstrates that, in the judicial quest for the social goal of racial balance among school districts, the state officer defendants have become the legal scapegoat for reasons far removed from their actual conduct in office. Obviously, neither the Governor nor the Attorney General are involved in the operation of school

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[5] The postponement of the April 7, 1970 racial balance plan for one semester by § 12 of 1970 PA 48, affected at most, approximately 3,000 to 4,000 tenth grade students in a school district with 289,743 students. See 433 F2d 897, 898-901, *supra,* and (20a).

districts which explains the lack of any de jure findings against these two state officers. The rulings against the State Board of Education and the Superintendent of Public Instruction, relating to transportation by the Detroit Board of Education in the late 1950's and school construction in Detroit during the 1960's on sites selected and acquired locally, with locally established attendance areas, cannot constitute purposeful segregatory conduct with a present causal effect of segregation as required by *Keyes, supra.*

In summary, the lower courts herein clearly erred in relying upon alleged inter-district financial disparities as a predicate for finding constitutional violations by the state officer defendants. *Rodriguez, supra.* Further, the requirement that purposeful affirmative action with the present causal effect of segregation is necessary in order to find de jure segregation, as enunciated by this Court in *Keyes, supra,* was not followed by the lower courts herein in finding de jure conduct by the state officer defendants.

As to defendants Governor, Attorney General and State Treasurer, there are simply no findings of conduct resulting in de jure segregation. The purported de jure findings against the State Board of Education and/or Superintendent of Public Instruction lack the requisite segregatory purpose and present causal segregatory effect basis required by *Keyes, supra.* To the significant extent the Sixth Circuit majority neglected the question of the lack of authority, under state law, of either of these two defendants to veto school site selections by defendant Detroit Board of Education, it is squarely in conflict with the en banc Fourth Circuit opinion in *Smith, supra.* In view of the patent conflicts between the lower courts opinions herein and the opinions of this Court in *Rodriguez, supra,* and *Keyes, supra,* and the Fourth Circuit opinion in *Smith, supra,* review of this cause should be granted.

II.

THE RULING OF THE COURT OF APPEALS THAT A "DETROIT-ONLY" DESEGREGATION PLAN COULD NOT REMEDY THE UNCONSTITUTIONAL SEGREGATION FOUND IN THE DETROIT SCHOOL DISTRICT IS NOT SUPPORTED BY THE RECORD, IS CLEARLY ERRONEOUS AND IN CONFLICT WITH THE DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS.

The majority of the Court of Appeals affirmed the order of the District Court rejecting the plaintiffs' Detroit-only plan to desegregate the Detroit School District. In dissent Judge Weick and Judge Kent stated that the majority was attempting to overcome demographic racial imbalance as between Detroit and surrounding school districts rather than correcting constitutional violations limited to the Detriot School District. (191a-193a, 224a-225a).

The plaintiffs in their complaint asked specifically for the "elimination of the racial identity of every school in the (Detroit) system and to maintain now and hereafter a unitary nonracial school system." (15a). This prayer of plaintiffs is in accord with the settled cases of this Court that if a school district is found to be de jure segregated Federal courts must order its dismantling so that the *system should then be unitary* as required by *Green* v *School Board of New Kent County*, 391 US 430 (1968); *Alexander* v *Holmes County Board of Education*, 396 US 19 (1969), and *Swann* v *Charlotte-Mecklenburg Board of Education*, 402 US 1 (1971).

It is clear from the record that the District Court conceived its role of dismantling a legally segregated school

district in a manner diametrically opposed to the teachings of this Court in *Swann, Green* and *Alexander.*

During the trial on the merits the District Court made the following observations that are pertinent to the matter at hand:

> "THE COURT: In other words, if the projection, and I will be surprised if it doesn't follow the course which history has shown since 1940, if the projection is in that direction then this occurs to me, how do you integrate a school district where the student population is, *let's make a guess,* 85 to 95 percent black? How do you integrate it? (Emphasis added).
>
> Trial Transcript, p 3537, June 18, 1971.
>
> "THE COURT: Mr. Ritchie has made some points along that line, and I have, and to repeat mine as I have said to several witnesses in this case: 'How do you desegregate a black city, or a black school system;' That is why I was interested in the projections of the student population of the city. We end up with student population of Detroit of 80 to 85 percent black. How do you integrate, or, if I find segregation, to put it another way, how do I desegregate. . . ."
>
> Trial Transcript, p 4003, 4004, June 24, 1971.

The preoccupation of the District Court with the speculative black student population of the Detroit School District in 1975 and 1980 is underscored by the following finding of the District Court contained in the ruling on issue of segregation rendered on September 27, 1971:

> ". . . The percentage of black students in the Detroit Public Schools in 1975-76 will be 72.0%, in 1980-81 will

be 80.7% and in 1992 it will be virtually 100% if the present trends continue. . . ." (20a).

Seven days later at the pretrial of all counsel in the case the District Court said:

> "As the Court indicated during the course of taking proofs it entertains serious reservations about a plan of integration, which encompasses no more than the public schools of the city of Detroit. . . .
>
> ". . . We must bear in mind that the task that we are called upon to perform is a social one which society has been unable to accomplish. In reality our courts are called upon, in these school cases, to attain a social goal through the education system, by using law as a lever." (40a-41a).

The District Court simultaneously ordered the Detroit Board of Education to submit a plan for the desegregation of its schools within 60 days, and ordered the state defendants to submit a multi-district plan of desegregation within 120 days. (43a, 46a-47a).

The attention of the Court is invited to the District Court's findings of fact and conclusion of law relating to plaintiffs' Detroit-only plan:

> "PLAINTIFFS' PLAN
>
> "1. The court finds that Plaintiffs' Plan would accomplish more desegregation than now obtains in the system, or would be achieved under Plan A or Plan C.
>
> • • •

"6. *The plan does not lend itself as a building block for a metropolitan plan.* (Emphasis added).

• • •

"7. The plan would make the Detroit school system more identifiably Black, and leave many of its schools 70 to 90 per cent Black.[6]

"8. It would change a school system which is now Black and White to one that would be perceived as Black, thereby increasing the flight of Whites from the city and the system, thereby increasing the Black student population.

• • •

CONCLUSIONS OF LAW

• • •

"4. Plaintiffs' Plan, while it would provide a racial mix more in keeping with the Black-White proportions of the student population than under either of the Board's plans or as the system now stands, would accentuate the racial identifiability of the district as a Black school system, and would not accomplish desegregation." (54a-56a).

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[6] This finding affirmed by the majority of the Sixth Circuit Court of Appeals is opposite to the recent holding of that Court, sitting en banc, in *Goss* v *Board of Education of the City of Knoxville*, ... F2d ...., decided July 18, 1973, approving a Knoxville-only plan which provided that "some schoools in the Knoxville system will remain identifiably black or white on the basis of pupil enrollments. . . ." p 3 of slip opinion.

The plaintiffs' Detroit-only plan was submitted by Dr. Gordon Foster, a widely utilized expert in the area of school desegregation, who testified that the plaintiffs' plan would meet the requirements of a unitary system, would meet the constitutional requirements of the Fourteenth Amendment, would eliminate discriminatory racially identifiable schools, and would improve educational opportunities of Detroit school children.

It is also worthy of attention that the District Court rendered its Ruling on Propriety of Considering a Metropolitan Plan on March 24, 1972, and ordered hearings on metropolitan plans to commence four days later on March 28, 1972, even though it did not render its decision on the Detroit-only Plan of Desegregation until noon on March 28, 1972, after the hearings on the multi-district plans were in progress.

Finally, this Court is asked to examine the following portion of the ruling on desegregation area and order for development of plan of desegregation entered June 14, 1972:

> "Within the limitations of reasonable travel time and distance factors, pupil reassignments shall be effected within the clusters described in Exhibit P.M. 12 so as to achieve the greatest degree of actual desegregation to the end that, upon implementation, *no school, grade or classroom b[e] substantially disproportionate to the overall pupil racial composition.* The panel may, upon notice to the parties, recommend reorganization of clusters within the desegregation area in order to minimize administrative inconvenience, or time and/or numbers of pupils requiring transportation." (Emphasis added). (101a-102a).

It is abundantly clear that approval of plaintiffs' De-

troit-only plan would frustrate the District Court in attaining the social goal of balancing the races between the Detroit and other tri-county school districts.

In affirming the ruling of the District Court on the Detroit-only plan the majority of the Sixth Circuit Court of Appeals compounded the error of the District Court that the constitutional violations found could not be remedied within the boundaries of the Detroit school system.[7] Apparently no plan to convert the Detroit system to a unitary system, as required by *Green*, *Alexander* and *Swann*, would do, since in the view of the Court of Appeals any Detroit-only plan would not overcome the racial demographic imbalance between the Detroit *and* other tri-county school districts, arising not from any action of public school authorities but from changes in housing patterns.

In *Green, supra,* a school district 57% black, 43% white, was found by this Court to be maintaining a separate school for blacks and a separate school for whites. It sought to dismantle such system by way of a freedom-of-choice plan. This Court laid down the controlling standard for dismantling a segregated school district in that a school board operating a dual school system was obligated to convert to a *unitary system* in which racial discrimination would be eliminated root and branch.

> ". . . The Board must be required to formulate a new plan and, in light of other courses which appear

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[7] This type of erroneous result was recently further expanded by the decision that no "Indianapolis Only Plan" of desegregation would meet the requirements of the Equal Protection Clause in a school district with only a 41.1% Negro student body. *United States* v *Board of School Commissioners of the City of Indianapolis, Indiana,* .... F Supp .... (SD Ind), No. IP 68-C-225, Slip opinion issued July 20, 1973, pp 6-9.

open to the Board, such as zoning, fashion steps which promise realistically to convert promptly to a system without a 'white' school and a 'Negro' school, but just schools." 391 US at 442.

In *Keyes, supra,* 2693, 2694, footnote 11, the Court reiterated that *Green, supra,* relying upon *Brown II* (349 US 294 [1955]), remains the governing principle. The ruling in *Green, supra,* was confirmed in *Alexander, supra,* and reviewed and approved in *Swann, supra.*

Alexander restated the standards for the desegregation of several Mississippi school districts:

> ". . . to operate as unitary school systems within which no person is to be effectively excluded from any school because of race or color." 396 US, at 20.

In *Swann,* the Court distilled its holdings in *Green* and *Alexander* and unanimously reaffirmed the standard to be followed:

> "Our objective in dealing with the issues presented by these cases is to see that school authorities exclude no pupil of a racial minority from any school, directly or indirectly, on account of race; it does not and cannot embrace all the problems of racial prejudice, even when those problems contribute to disproportionate racial concentrations in some schools." 402 US, at 23.

The Court then gave fair warning that its ruling should not be misapplied:

> ". . . If we were to read the holding of the District Court to require, as a matter of substantive constitutional right, any particular degree of racial balance or mixing, that approach would be disapproved and we

would be obliged to reverse. The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole." 402 US, at 24.

Finally, the Court in *Swann* said:

> "It does not follow that the communities served by such systems will remain demographically stable, for in a growing, mobile society, few will do so. Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system. . . ." 402 US, at 31-32.

It is clear that neither the District Court nor the Court of Appeals applied and followed these standards. Neither lower court made a finding that any pupil of a racial minority would be excluded from any school, directly or indirectly, in the Detroit School District, on account of race under plaintiffs' Detroit-only plan. There can be no question but that both the District Court and the Court of Appeals were attempting to provide for more than a correction of the adjudged constitutional violation, but instead sought to overcome demographic racial imbalance between Detroit and suburban communities, as opposed to correcting alleged racial segregation inside the Detroit School District. Racial imbalance as a result of demographic residential patterns, as contrasted with state enforced segregation within a school district, is not offensive to the Constitution. *Spencer* v *Kugler*, 326 F Supp 1235 (D NJ, 1971), affirmed on appeal, 404 US 1027 (1972). Clearly, the rulings of the District Court and the Court of Appeals

are in direct conflict with the controlling authorities of this Court, and this Court is "obliged to reverse." *Swann, supra,* p 24 of the opinion.

The effect of the Court of Appeals' decision must be that a unitary system may not be constitutionally established in a majority black school district. The Court of Appeals uses the adjective "overwhelmingly" black in conjunction with its attempt to look into the foreseeable future. No doubt this is based upon the District Court's speculation as to the school population of the Detroit School District in 1975, 1980 and 1990. Since *Swann* proscribes year by year judicial adjustments in pupil assignments because of changing demographic patterns within a school district, and *Green* requires desegregation of a segregated school district now, the purely speculative student population of the Detroit School District in 1975, 1980 and 1990 cannot form the basis for the conclusion of the District Court that a unitary system cannot be established within the majority black Detroit School District.

To the contrary, this Court has held that a unitary school system, in which no pupil of a racial minority is excluded from any school on account of race, must be established in a school district that is majority black. *Wright* v. *Council of the City of Emporia,* 407 US 451 (1972); *United States* v *Scotland Neck Board of Education,* 407 US 484 (1972); *Raney* v *Board of Education of Gould School District,* 391 US 443 (1968).

The decision of the Sixth Circuit Court of Appeals in *Northcross* v *Board of Education of Memphis,* 420 F2d 546, 548 (1969), required a unitary system within a segregated school district 57% black and 43% white. In that case, the Court of Appeals asked counsel for plaintiffs, who

is also chief trial counsel for plaintiffs here, to advice what would be a unitary system in Memphis:

> "He replied that such a system would require that in every public school in Memphis there would have to be 55% Negroes and 45% white. A departure of 5% to 10% from such rule would be tolerated. . . ."

These cases unequivocally demonstrate that there is no constitutional requirement that the conversion of a majority black school district to a unitary system be effectuated by involving surrounding school districts. To the contrary, these cases stand for the proposition that unitary systems may be, indeed, must be, achieved within majority black school systems. The District Court's notion, affirmed on appeal, that Detroit could not be integrated because it would be perceived as black, is plainly erroneous. Almost every school district in the country is either majority white or majority black and thus is susceptible of being perceived as such. This numerical fact of life obviously gives rise to no constitutional infirmity, whether the pupil majority be white or black.

Moreover, the ruling below that the broad remedial equitable power of a Federal District Court is insufficient to create a unitary school system within Detroit compels the conclusion that both lower courts have ruled, in effect, that the racial demographic pattern both within Detroit and between Detroit and other tri-county school districts is inherently unconstitutional. Such result is both unsupported by precedent and directly in conflict with the prior decisions of this Court cited above.

The holding of the Court of Appeals that it is constitutionally impermissible to establish a unitary system within the Detroit School System squarely conflicts with the de-

cision of the Fourth Circuit Court of Appeals in *Bradley* v *School Board of Richmond, Virginia*, 462 F2d 1058 (CA 4, 1972), affirmed by an equally divided court in ____ US ____, 93 S Ct 1952 (1973). In *Bradley* v *Richmond, supra*, the District Court approved a plan of desegregation of a segregated school district composed of 64% black and 36% white. Shortly after the desegregation plan was implemented the Richmond Board of Education moved to add two adjoining majority white school districts to provide a "better" racial mix. The Fourth Circuit Court of Appeals held that there is no federally protected right to racial balance within even a single school district but only a right to attend a unitary school system. Once a unitary school system was achieved within the school district 64% black and 36% white, the authority of the District Court to further intervene by racially balancing with white suburban school districts was neither necessary nor justifiable. *Bradley* v *Richmond, supra*, must clearly stand for the proposition that a unitary school system can be achieved within a school district that is 64% black and 36% white, notwithstanding that adjoining school districts are majority white. Thus, if the decisions of the lower courts are allowed to stand, a unitary system may be achieved in a 64% black school district in the Fourth Circuit but is unachievable in a 63.8% black school district in the Sixth Circuit. A nation committed to *rule of law* cannot abide one rule of law for the Fourth Circuit and another rule of law for the Sixth Circuit.

The decision of the Court of Appeals affirming the decision of the District Court rejecting plaintiffs' Detroit-only plan is clearly erroneous and in open conflict with the clear standards enunciated by this Court in *Green*, *Alexander* and *Swann*. The state of the law so carefully developed and delineated by this Court in these cases to guide district courts in school desegregation cases will be

thrown into disarray, uncertainty and confusion unless this Court grants certiorari and reverses such holding.

Rejection of plaintiffs' Detroit-only plan by the District Court and approved by the majority of the Sixth Circuit Court of Appeals because it was not a building block for a multi-district racial balance plan is opposite to the holding of this Court in *Scotland Neck, Emporia and Raney.*

The decision is also in direct conflict with the decision of the Fourth Circuit Court of Appeals in *Bradley* v *Richmond, supra.* Because of the importance of this case to the jurisprudence of this nation, the conflict between the two Circuit Courts of Appeals must be resolved without delay.

III.

THE DECISION OF THE COURT OF APPEALS, THAT A MULTI-SCHOOL DISTRICT REMEDY IS CONSTITUTIONALLY PERMISSIBLE HEREIN, IS ERRONEOUS AND IN CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEALS AND THIS COURT.

Plaintiffs' complaint herein alleged de jure segregation only within the confines of the School District of the City of Detroit and prayed for relief limited to establishing a unitary system of schools therein. (5a, 14a, 15a). After a lengthy trial on the merits, at which no school district other than Detroit was present as a party in the cause, the District Court ruled that the Detroit school system was being operated as a de jure segregated school system.

Subsequently, in enunciating the scope of the multi-school district remedy, the District Court candidly stated the following:

". . . It should be noted that the court has taken no proofs with respect to the establishment of the boundaries of the 86 public school districts in the counties of Wayne, Oakland and Macomb, nor on the issue of whether, with the exclusion of the city of Detroit school district, such school districts have committed acts of de jure segregation." (59a-60a).

Nevertheless, the trial court proceeded to enter the most sweeping remedial decree ever entered in a school desegregation case, judicially creating a 53 school district desegregation area involving 780,000 or 1/3 of Michigan's public school pupils.[8] This remedial decree mandates the reassignment of pupils across school district boundaries and compels massive transportation of 310,000 pupils throughout an area covering approximately 700 square miles for the sole purpose of achieving racial balance. (72a, 101a-102a).

Thereafter, the trial court commanded the state officer defendants to pay for the acquisition of at least 295 buses for use in a partial, interim, multi-district desegregation plan during the 1972-73 school year. The approximate cost of this initial order to acquire transportation would have been approximately $3,000,000.00 since one school bus meeting Michigan standards costs approximately $10,500.00. (106a-107a).

The Court of Appeals, while affirming the propriety of a multi-school district remedy, partially vacated the multi-

[8] Eighteen of these 53 school districts have never been parties to this proceeding at any time and except for Detroit, the remaining 34 school districts were granted limited intervention on March 15, 1972 only for the purposes of filing a brief on the propriety of a multi-district remedy and reviewing multi-district plans.

district remedial decrees for the sole reason that 18 affected school districts within the desegregation area had never been made parties to this cause, contrary to Rule 19, FR Civ P. (176a-179a). However, it is clear that upon remand all school districts made parties to the cause may be included in the multi-district remedy.

The ruling of the Sixth Circuit majority, affirming the propriety of a massive multi-district remedy herein, must be tested against the controlling federal appellate precedents. When so tested, these defendants submit that the conflict between such ruling and the decisions of both other courts of appeals and this Court becomes manifest.

In *Swann, supra,* this Court unanimously enunciated the following principles concerning school desegregation remedies:

> ". . . The task is to correct, by a balancing of the individual and collective interests, the condition that offends the Constitution.
>
> "In seeking to define even in broad and general terms how far this remedial power extends it is important to remember that judicial powers may be exercised only on the basis of a constitutional violation . . .
>
> ". . . As with any equity case, the nature of the violation determines the scope of the remedy . . ." 402 US, at 16.

Here, the violation or condition found to offend the Constitution is expressly limited to de jure segregation within the Detroit school system, which condition may be remedied as set forth in Part II herein in accordance with *Swann, supra.*

The courts below, contrary to the controlling principles of *Swann, supra,* have expanded the remedy to include scores of other school districts without the support of any claims, proofs or findings concerning either the establishment of school district boundaries or any conduct resulting in de jure segregation by any school district other than Detroit.

This is not surprising in light of the history of Michigan law establishing the coterminous nature of the school district and city boundaries of Detroit over 100 years ago in 1842 as follows:

> "That the city of Detroit shall be considered as one school district, and hereafter all schools organized therein, in pursuance of this act, shall, under the direction and regulations of the board of education, be public and free to all children residing within the limits thereof, between the ages of five and seventeen years, inclusive."
>
> See Section 1 of 1842 PA 70.

Moreover, some 98 years later, in 1940, the population of the City of Detroit was approximately 90% white, thus negating any possible inference that the city and school district boundaries were made coterminous for the purpose of separating people or school children on the basis of race. (21a).

In *Spencer* v *Kugler, supra,* plaintiffs challenged the racial imbalance existing among New Jersey's school districts. The lower court, in rejecting plaintiffs' challenge, noted that under New Jersey law school district boundaries conform to municipal boundaries, p 1240, and held the following:

> "A continuing trend toward racial imbalance caused by housing patterns within the various school districts is not susceptible to federal judicial intervention. The New Jersey Legislature has by intent maintained a unitary system of public education, albeit that system has degenerated to extreme racial imbalance in some school districts; nevertheless the statutes in question as they are presently constituted are constitutional." 326 F Supp, at 1243.

On appeal, this Court affirmed. Obviously the Court of Appeals' decision in this cause is in derogation of *Spencer* v *Kugler, supra.*

Turning to *Bradley* v *Richmond, supra,* a case in which historically, under Virginia law, unlike Michigan, every school district operated a dual school system, the Fourth Circuit, having, at p 1064, "searched the 325-page opinion of the district court in vain for the slightest scintilla of evidence that the boundary lines of the three local governmental units have been maintained either long ago or recently for the purpose of perpetuating racial discrimination in the public schools" found none and accordingly reversed. In reversing the order of the lower court compelling the restructuring of three school districts for racial balance purposes as being prohibited by the Tenth Amendment, in the absence of purposeful discrimination as to the establishment and maintenance of school district boundary lines, the Fourth Circuit correctly followed the purpose test subsequently enunciated by this Court in *Keyes, supra.* Here, as in *Bradley* v *Richmond, supra,* the record is barren of proof of purposeful segregation concerning the establishment and maintenance of the school district boundaries in question. (See the dissenting opinion of Circuit Judge Kent, 222a-225a.) Thus, the decision of the Fourth Circuit in *Bradley v Richmond, supra,* and the Sixth Circuit major-

ity herein constitute an irreconcilable conflict which may only be resolved by this Court.

The Sixth Circuit Court's attempt to distinguish *Bradley v Richmond, supra,* on the basis that the instant case does not involve a restructuring of school districts, only the cross-district reassignment of pupils, is manifestly untenable. (175a). The District Court's order of June 14, 1972 commands, inter alia, the following:

> "The State Superintendent of Public Instruction, with the assistance of the other state defendants, shall examine, and make recommendations, consistent with the principles established above, for appropriate interim and final arrangements for the (1) financial, (2) administrative and school governance, and (3) contractual arrangements for the operation of the schools within the desegregation area, including steps for unifying, or otherwise making uniform the personnel policies, procedures, contracts, and property arrangements of the various school districts.
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> ". . . In particular, the Superintendent shall examine and choose one appropriate interim arrangement to oversee the immediate implementation of a plan of desegregation." (104a-105a.)

Further, the Court of Appeals majority itself states later in the opinion that "the Legislature of Michigan has an opportunity to determine the organizational and governmental structure of an enlarged desegregation area" for remedial purposes. (188a-189a). This language conclusively lays to rest any pretense that the multi-district remedy herein may be implemented among scores of legally, geographically

and politically independent Michigan school districts, each having its own locally elected board of education with legal authority over matters of taxation, bonding, personnel and curriculum, without a traumatic restructuring of the existing organizational and governmental structure of scores of school districts in Wayne, Oakland and Macomb counties. See, e.g., Part 1, Chapter 4 and Part 2, Chapter 9 of the School Code of 1955, as amended, *supra*.

Moreover, by the above quoted language the Court of Appeals has correctly recognized that, in Michigan, as in Virginia, the power over school district boundaries is reposed in the Legislature, not the State Board of Education. *Bradley* v *Richond, supra,* p 1067. Thus the analogy the Sixth Circuit makes (175a) between the powers of the Virginia State Board of Education and the State of Michigan, including its legislative branch of government, is unsound.

In essence, the Fourth Circuit ruled that, absent proof of purposeful segregation in the establishment and maintenance of school district boundaries, a multi-district remedy was beyond the scope of federal judicial power under the Constitution. The Sixth Circuit ruled that, notwithstanding the absence of any pleaded allegations, proofs or findings of purposeful segregation in the establishment and maintenance of school district boundaries, nevertheless a multi-district remedy is constitutionally permissible for the sole purpose of achieving racial balance within a three county area. This conflict between the circuits is clear and, we respectfully submit, merits the granting of certiorari herein.

In the language of *Keyes, supra,* 2695, the school districts involved herein are legally, politically and geographically "separate, identifiable and unrelated units" within the State

of Michigan. As demonstrated above, both lower courts herein have recognized the need for restructuring these governmental units if a multi-district remedy is to be effectuated in this cause. Otherwise, parents would be voting on school board candidates and school tax rate proposals in the district where they reside, while their school age children would be educated in another school district where the parents would be denied any effective control over school board members, school tax rates, and decisions affecting educational personnel and curriculum. The cross-district reassignment of pupils for purposes of racial balance, without more, would completely vitiate any concept of local parental control over the education of their children.

This Court has recently recognized in both *Emporia, supra,* 469 and 478, and *Rodriguez, supra,* 1305, the continuing importance of local participation and control in educational decision making. This rational state interest, which is sufficient to justify large inter-district financial disparities, is served by the existing boundaries and governmental structure of the school districts involved herein covering a densely populated three county area. The coterminous nature of the boundaries of the city and school district of Detroit is rational, racially neutral and of historic origin. As noted in *Rodriguez, supra,* 1307, footnote 110, "[t]his Court has never doubted the propriety of maintaining political subdivisions within the States and has never found in the Equal Protection Clause any *per se* rule of 'territorial uniformity.'" Thus, in the absence of any finding below that the school district boundary lines involved herein are "the product of a state contrivance to segregate on the basis of race or place of origin," the multi-district remedy decreed below must fall. *Wright* v *Rockefeller,* 376 US 52, 58 (1964).

Education is not among the rights afforded their explicit or implicit protection under the Federal Constitution. *Rodriguez, supra,* 1297. Thus, while not disparaging the undisputed importance of public education, it is wise to remember that education is a function entrusted to the states under our federal system of government. The Michigan legislature, in response to the state constitutional command to establish and maintain a system of free public elementary and secondary education (Const 1963, art 8, § 2), has enacted the provisions of the School Code of 1955, as amended, *supra.* Pursuant to this statutory enactment, local participation and control over public education is encouraged and facilitated through local school districts and locally elected school boards with broad discretionary authority. As stated by this Court in *Rodriguez, supra,* 1305, "[a]n analogy to the Nation-State relationship in our federal system seems uniquely appropriate."

However, the rulings of the lower courts herein concerning a multi-district remedy deny due process to the affected school districts outside Detroit in the judicial quest for racial balance. (See dissenting opinions of Judge Weick, 205a-212a; Judge Kent, 230a-238a; Judge Miller, 239a-340a).

Under Michigan law, Michigan school districts may sue and be sued. Further, each board of education has the right to hire local counsel of its own choosing. See §§ 352 and 609 of the School Code of 1955, as amended, *supra.* Moreover, it has been the consistent position and conduct of the state officer defendants throughout this litigation that they do not represent any of the school districts involved in this cause. The false notion that the interests of the state officer defendants and local school districts are as one, and thus may be effectively represented by just the state defendants, is surely put to rest by the decision of defendant

Detroit Board of Education to accept the de jure findings against it and support a multi-district remedy.

On this point, the majority opinion of the Court of Appeals is manifestly inconsistent and illogical. Such opinion recognizes the independent legal status of Michigan school districts for purposes of remedial housekeeping, but on the crucial issues of remedy within Detroit and the legal propriety of a multi-district remedy, this independent legal status is completely ignored. (176a-178a). The holding that each "affected district first must be made a party to this litigation and afforded an opportunity to be heard" (177a), is without substance since the opportunity to be heard is available only after the decisive issues have already been adversely determined.

For the school districts affected herein and their boards of education, the interest at stake is their continued existence as viable governmental entities. To paraphrase the language of the dissenting opinion in *Emporia, supra,* 478, to bar these school districts from operating their own school systems for the children within their respective geographical boundaries is to strip them of their only governmental responsibility and to deny them any existence as independent governmental entities, all without their day in court. Further, unlike *Emporia, supra,* this case involves existing school districts outside the geographical area of the school system previously found to be de jure segregated.

For the parents of school age children within these school districts, the interest at stake is the parental right to direct the upbringing and education of children under their responsibility and control. *Pierce* v *Society of Sisters,* 268 US 510 (1925). *Wisconsin* v *Yoder,* 406 US 205 (1972). This paramount parental interest, which limits the scope of state power over public education, is also clearly entitled

to recognition in terms of the power of federal courts over public education for purposes of racial balance. At a minimum, such parents are entitled to be heard, through their locally elected boards of education, at a meaningful stage in the proceedings. After all, as cogently noted by Mr. Justice Powell in *Keyes, supra,* 2717, 2718, the compulsory transportation of any child to a distant school solely for racial balance purposes impinges upon the liberty of that child and it is the parents and children who shoulder the full burden of affirmative remedial action in these cases, although they did not participate in any constitutional violation.

In summary, the decision of the Court of Appeals that a multi-school district remedy is constitutionally permissible herein squarely conflicts with this Court's affirmance in *Spencer* v *Kugler, supra.* Further, there is an irreconcilable conflict between the Fourth Circuit's decision in *Bradley* v *Richmond, supra,* and the Sixth Circuit's decision herein on the question of a multi-school district remedy. Both cases involve the judicial restructuring of independent local school districts for racial balance purposes. Where, as here, the record is barren as to any multi-school district constitutional violation concerning either school district boundary lines or the conduct of any school district, other than Detroit, the granting of certiorari is clearly in order to review this unprecedented expansion of federal judicial power over public education. The affected local school districts, their boards of education and, most importantly, the hundreds of thousands of parents and school age children residing therein, upon whom the burden of affirmative remedial action will fall, deserve no less than full review by this Court of the unprecedented decision of the Court of Appeals.

IV.

THE QUESTION OF WHETHER A MULTI-SCHOOL DISTRICT REMEDY IS CONSTITUTIONALLY PERMISSIBLE IN THIS CAUSE IS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE DEFINITIVELY SETTLED BY THIS COURT.

In its July 20, 1972 order herein, granting an interlocutory appeal and staying the proceedings below, except for remedial planning, the Court of Appeals stated:

> "[T]here is at least one difficult issue of first impression that never has been decided by this court or the Supreme Court." (108a).

This question is obviously the question of under what circumstances a multi-school district remedy, expressly requiring the cross-district reassignment and transportation of pupils and contemplating, if not yet requiring, the eventual merger of separate, identifiable and unrelated school districts, is constitutionally permissible.

Based on the prior decisions of this Court, as applied to this cause, the lower courts committed manifest error in decreeing a multi-district remedy in the absence of any pleaded allegations, proofs or findings that the school district boundaries were established and maintained with the purpose and present causal effect of separating school children solely by race. However, assuming arguendo that the prior precedents of this Court are not controlling herein, it is beyond dispute that this is an important question of federal law which this Court should resolve.

The "familiar phenomenon" of racial residential concentration within large urban areas is, indeed, a hard reality

of American life on a national scale. Further, the fact of majority black, big city school districts is also a national phenomenon which includes not only Detroit and Richmond but also, for example, Atlanta, Cleveland, Baltimore City, Birmingham, Chicago, Memphis, New Orleans, Philadelphia, Washington, D.C., Gary, Kansas City, Newark, Oakland, St. Louis. *Swann, supra,* p 25; *Keyes, supra,* 2702, 2704; 1971 HEW Enrollment Survey, 118 Cong. Rec. S 144-148, January 20, 1972; *United States* v *Board of School Commissioners, Indianapolis, Indiana,* 332 F Supp 655, 677 (1971).

As noted in the dissenting opinion of Circuit Judge Kent, it is the underlying racial demographic pattern within a 3 county area that forms the now inarticulated first premise for the majority opinion of the Court of Appeals requiring a multi-district remedy. (224a). This type of demographic pattern, itself a national phenomenon, is clearly a recurring theme in present and future school desegregation cases in the Federal courts with which this Court must come to grips.

The people of Michigan are aware that, notwithstanding a long history of dual school systems in every school district by mandate of state law never found in Michigan, the proposed multi-district remedy in *Bradley* v *Richmond, supra,* was ultimately rejected by the Court of Appeals for the Fourth Circuit and affirmed by equally divided action of this Court. The concern expressed by Mr. Justice Powell's opinion in *Keyes, supra,* 2702, 2703, 2707-2711, for uniform national standards in school desegregation litigation is relevant here. If, unlike, *Bradley* v *Richmond, supra,* there is to be a multi-district remedy here, the hundreds of thousands of parents of Michigan school children who will be reassigned out of their neighborhood schools and transported across school district

and county lines solely for racial balance purposes should first be told, by this Court, why the result in this cause must be different than the result in *Bradley* v *Richmond, supra,* i.e., why the rule in Michigan must be different than the rule in Virginia.[9]

Within Michigan, the judicially created "desegregation area" originally ordered by the District Court involved 53 legally independent school districts and included 780,000 school children and their parents. Further, the proposed multi-district remedy will have a traumatic impact on Michigan's statutory arrangements for local governance and control of public education, not to mention a multi-million dollar impact on limited public funds otherwise available to educate, not transport, school children. Before this unprecedented exercise of federal judicial power becomes a reality, in the name of racial balance as the single judicial goal before which all else must fall, we respectfully submit that this Court should carefully review and decide this important cause on the merits.

As alluded to in the opinion of Mr. Justice Powell in *Keyes, supra,* 2718, currently the major issue in public education is the "perennially d[i]visive debate over who is to

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[9] In contrast to both decisions in *Bradley* v *Richmond, supra,* and the instant cause, the recent district court decision in *United States* v *Board of School Commissioners of the City of Indianapolis, Indiana, supra,* has further confused the law in this area by compelling a multi-school district remedy limited to the one way transfer and transportation of black students from Indianapolis to surrounding school districts for the reason that "[t]he Court is of the opinion that it would be without jurisdiction to order the exchange of pupils between IPS (Indianapolis) and added defendants at this time.

be transported where."[10] This hotly disputed issue influences local, state and national elections and, as this Court is aware, has spawned serious attempts to amend the Constitution. Without guidance from this Court, this conflict will only become more exacerbated as the focus shifts from intra-district litigation to inter-district litigation involving cross-district reassignment and transportation of children for racial balance purposes. This question should, indeed, must be definitively settled by this Court in the interests of returning public education to its primary goal of quality education for all children rather than protracted nationwide litigation over school district restructuring for the sole purpose of racial balance.

It is Negro children of IPS (Indianapolis) and not suburban children who are being deprived of a constitutional right, and so long as the various school corporations remain separate the Court believes that it would have no basis to direct that a suburban child be transported out of its own school corporation." Slip opinion issued July 20, 1973, p 27.

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As noted above in the STATEMENT OF THE CASE plaintiffs filed a motion on August 6, 1973 in the District Court to compel the joinder of additional school districts as parties. If such motion is granted, the school district defendants herein will include 85 independent school districts having approximately 1,000,000 pupils and covering approximately 1,952 square miles.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the decision of the Sixth Circuit rendered herein on June 12, 1973.

Respectfully submitted,

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